sidered it as earnestly, and carefully and sincerely as I have done. I most sincerely hope that they are right; for, if they are, they have declared the very justice of this case, and have saved us from conclusions that might operate very unjustly in time to come. I cannot see as they do, and yet I freely admit, that with their opinions against me, the probabilities must be that I am wrong. I would reverse the judgment on both points.

Judgment affirmed.

In the Court of Common Pleas of the Twelfth Judicial District of Pennsylvania.

IN THE MATTER OF DAVID MUMMA'S ACCOUNT.

An attorny at law, guardian of minors, can lawfully charge his wards for professional services, in conducting litigation for their benefit.

The opinion of the court was delivered by

This case came before the court, on the report of an auditor appointed to pass on the account of David Mumma, Esq., guardian of the minor children of William Gotshall, deceased.

The report showed that the accountant had commenced and conducted to successful termination, an action for the recovery of damages for injury done by the Harrisburg and Lancaster Railroad to the estate of the wards. The amount paid by the guardian to assistant counsel was allowed by the auditor, but the sum of one hundred dollars claimed for his own professional services was disallowed.

Exception was taken to the report, and after argument, the following opinion was delivered by

PEARSON, P. J.—The report of an auditor presents a single question, "can a guardian, who is an attorney-at-law, charge his ward for professional services rendered?" The auditor came to the conclusion that he could not, and struck the item from the account.

The beneficial character of the service is conceded, but it is said to be against legal policy to sustain the charge, and that it is contrary to settled principles of jurisprudence. In Pennsylvania we have no decision upon the subject of which I am aware, and the auditor, therefore, adopting the English rule, has shown by a clear, lucid and logical argument, that from the law as there established, the claim must be disallowed.

In England it is clearly settled that a trustee is never entitled to compensation, however arduous the duties of the trust, except where there is an express provision found in the instrument creating it, and this rule is applicable to every class of trusts, including executors, administrators and guardians.

The doctrine is the same in New York, except where it has been altered by statute. See 1 Johns. Rep. 27; Idem, 527; *In re Bank of Niagara*, 6 Paige, 213.

In Pennsylvania, on the other hand, the rule is clearly otherwise, and compensation is allowed in any case, except where the trustee has undertaken to perform the duties gratuitously.

At the time of the American revolution, there was no decision in England showing that an attorney-at-law, being a trustee, could not recover for services rendered to the trust estate as an attorney, and consequently, as the decisions *since* are not obligatory, there is no rule binding on us. Had the subject come before their courts at an antecedent period, I have no doubt that the point would have been settled as now established. The courts both of law and equity have long since declared that a trustee could recover no compensation, nor is anything allowed to a barrister without an express contract, and probably not to an attorney, beyond his legal fees. But every State has a right to establish such a system of jurisprudence as best suits the circumstances of the people, and accords with the interest of the majority, and in Pennsylvania, from the first settlement of the province, trustees of every character have been entitled to compensation, and attorneys-at-law can recover on a *quantum meruit*. The objection to this claim most relied on under the English law, has, therefore, no application in this State.

It is said to be contrary to public policy to allow any remuneration for professional services to an attorney, when acting in a fiduciary capacity, as thereby he might be tempted to involve the estate in improper litigation. His duty might clash with his interest, and the latter preponderate. Such appears to be the reasoning of Lord Lyndhurst, as given by Williams, in his treatise on Executors, 1680, and all compensation to the attorney was refused. See 2 Dow and Clark, 51.

In *Christophus* against *White*, 10 Beavan, 523, the court went even further, and refused it to the partner of the trustee, as by allowing it the latter would indirectly obtain compensation, which is against public policy. It is there said, however, that had another attorney been employed, it would have been allowable. In the matter of the *Bank of Niagara*, 6 Paige, 213, the same course of reasoning is adopted by the chancellor of New York, and nothing was allowed to the attorney-trustee but his legally taxable costs. "As a trustee he must perform his duty without compensation, and as an attorney can recover nothing for services without a contract, and cannot bargain with himself." It is also stated that there would be great danger in suffering a trustee to employ counsel when he is himself to be employed. On the contrary we have a decision of the Supreme Court of Alabama, in *Harris* vs. *Martin*, 9 Ala. R. 895, in which the whole subject is fully and ably examined, and compensation allowed an attorney-administrator, for attending to suits brought and carried on *bona fide*.

The court declare, that for advice, or other small acts done in the performance of the trust, he cannot be compensated, but for litigation of importance to the estate, publicly conducted, there can be no difficulty in the court determining the propriety of the proceeding and amount of remuneration, and an allowance should be made equal to that ordinarily given to counsel of equal standing for similar services, the court to judge of the necessity.

The difference is clearly pointed out between the rule in England and Alabama, both as to compensation to trustees and attorneys, and it is said that there is no reason why an attorney should not be allowed for his services when necessary, and *bona fide* rendered, and

the inquiry should be, "what would a prudent man, vested with the functions of an administrator, feel authorized to pay an attorney under all the circumstances?"

This decision, in all its bearings, is better adapted to our system of jurisprudence than the rule adopted in England and New York, and I am disposed to follow it.

For one humble member of the legal profession I never can consent to establish a rule by which it is implied that every lawyer is dishonest, and will encourage litigation for the mere purpose of putting money in his own pocket. By a parity of reasoning we must say, that if the guardian chanced to be a physician, he could not charge for professional services rendered to his ward in case of sickness, because he had an interest in creating an imaginary disease so as to render the services; or if the sickness were real, in making more visits than the nature of the case required. Should he be a tailor, shoemaker, or hatter, the bills for articles furnished the minor in his line should be rejected, because the interest of the mechanic would lead him to furnish too great an amount of the particular kind of clothing to the ward, thereby clashing with his duty.

The court can as well determine as to the necessity and propriety of litigation, as it can of the mechanics' bills, and infinitely better than of the service of the physician.

We feel ourselves fully authorized, on every sound legal principle in force in Pennsylvania, to allow a fair and reasonable compensation for professional services rendered by a trustee, the court always being the judge as to the propriety, necessity, and value of the services. Nor do we believe that such a rule will endanger the interest of the *cestui que trust*, but on the contrary, will tend to promote it.

By the practice of the English and New York courts, the trustee is tempted to give himself as little trouble as possible in relation to the trust estate. He may know of valid claims, yet fail to pursue them, as thereby his labor is increased without adding to his compensation. A vigilant, active, intelligent lawyer, acting in a fiduciary capacity, may be able to ferret out and recover property of value to those whom he represents, and in our opinion the interests of society are promoted by encouraging him in so doing. We can-

not believe that by so deciding we clash with any rule of law or public policy.

In England and New York, an attorney administrator is justifiable in engaging another attorney to attend to the interest of the estate, and if such an attorney happen to be an executor or guardian, he may in turn employ his employer in relation to *his* trust. Why not permit each to attend to the business of the estate, which he best understands, and not drive the two to an exchange of labor?

The litigation, for attending to which the present compensation is claimed, came under the immediate observation of this court. We can, therefore, judge of its propriety, and the extent of the services. The guardian through his knowledge as an attorney, and by his vigilance in the pursuit of his profession, saved the whole amount recovered from the railroad company, for his wards, and is, in our opinion well entitled to the compensation demanded.

If we had not the power to allow it in this form, we should in another, by increasing the sum given by the auditor to cover expenses, and as compensation for his labor as guardian. We prefer, however, to meet and decide the main question of the case, it being of great importance to the legal profession in this commonwealth, as they, more than any other class of men, are called upon to act in a fiduciary capacity.

It is ordered that the report of the auditor be reversed on the exception filed. That the account as originally filed be confirmed, and the costs of the audit paid out of the fund in the hands of the guardian to be equally deducted from the share of each ward.

In the Supreme Court of Tennessee, September Term, 1856.

MARCUS C. PARKER *vs.* REBECCA MEEK, SR.[1]

1. The parent, as such, has no direct remedy at common law for the seduction of a daughter. He has to resort therefor to what has been denominated, "but little

[1] We are indebted to the learned State Reporter, John L. T. Sneed, Esq., for the early sheets of this 3d Vol.